

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PATRICK O'BRIEN, MARILYN O'BRIEN,)
CATHERINE L. O'BRIEN, RACHEL)
O'BRIEN, and AMY E. O'BRIEN,)

Plaintiffs,)

v.)

CESSNA AIRCRAFT COMPANY,)
GOODRICH AEROSPACE COMPANY,)
SUBURBAN AIR SERVICES, INC.,)
PRATT & WHITNEY CANADA CORP.,)
and TEXTRON, INC.,)

Defendants.)

8:09CV40

MEMORANDUM AND ORDER

This matter is before the court on plaintiffs' reinstated motion to remand, Filing No. [81](#), and objections, Filing No. [150](#), to the magistrate judge's findings and recommendation, Filing No. [148](#).¹ On January 23, 2009, plaintiffs filed this action in the District Court of Douglas County, Nebraska. Filing No. [1](#), Ex. B. Plaintiffs filed the action against defendants for injuries sustained in a February 7, 2007, crash of a Cessna 208B model Caravan aircraft operated by plaintiff Patrick O'Brien. Plaintiffs contend that they encountered icing conditions and the deicing equipment failed and caused the crash. The magistrate judge determined that this court lacks jurisdiction and the case should be remanded to state court.

A district court reviews de novo those portions of a magistrate's order that are objected to by a party. [Grinder v. Gammon, 73 F.3d 793, 792 \(8th Cir. 1996\)](#). "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations

¹There are also two additional pending motions, a motion for leave to file supplemental authority, Filing No. [159](#), and a motion response for leave to file supplemental authority, Filing No. [162](#). In Filing No. [159](#), defendant Cessna refers this court to a case from the United States District Court for the Middle District of Pennsylvania. The court has reviewed that case and finds it does not need additional briefing. Accordingly, Filing No. [159](#) is denied. Plaintiff's motion, Filing No. [162](#), to respond to Filing No. [159](#) is, therefore, moot.

made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.” 28 U.S.C. § 636(b)(1). A district court may reconsider a magistrate judge's ruling where it has been shown that the ruling is clearly erroneous or contrary to law. [*Ferguson v. United States*, 484 F.3d 1068, 1076 \(8th Cir. 2007\)](#) (citing [28 U.S.C. § 636\(b\)\(1\)\(A\)](#)).

On November 7, 2008, plaintiffs filed a first action in the District Court of Douglas County, Nebraska. Filing No. [1](#), Ex. C. On December 5, 2008, Cessna removed this first action to the United States District Court for the District of Nebraska, pursuant to [28 U.S.C. § 1442\(a\)\(1\)](#), which is the Federal Officer Removal Statute. On December 8, 2008, plaintiffs moved to remand this first action for lack of jurisdiction. Cessna filed an opposition to this motion. Thereafter, on January 12, 2009, plaintiffs filed a voluntary motion to dismiss their first action in order to add an additional party. This court granted the motion on January 21, 2009. Cessna brought this motion for removal prior to the serving of any of the defendants. Subsequently, this case was transferred to the Multidistrict Panel, Filing Nos. [72](#) and [77](#), and then returned to this court, Filing No. [79](#). The plaintiffs have now reinstituted the motion to remand.

The magistrate judge determined that there is no federal question in this case nor is there complete diversity. The magistrate judge recommended that this case be remanded to the District Court of Douglas County, Nebraska. Defendants object and argue this court has jurisdiction pursuant to the Federal Officer Removal Statute, and [28 U.S.C. § 1441\(b\)](#) which gives this court federal removal jurisdiction. Plaintiff argues there is no basis for federal jurisdiction in this case and moves the court to remand to state court. The court has carefully reviewed the well-reasoned findings and recommendation submitted by the magistrate judge. The court finds that the objections filed by the defendants are without

merit, as the magistrate judge is correct with respect to all his determinations regarding jurisdiction. The court finds the magistrate judge is correct in both his factual findings and legal conclusions. Accordingly, the court will overrule the objections, adopt the findings and recommendation in its entirety, and remand this case to state court.

THEREFORE, IT IS ORDERED:

1. The objections, Filing No. [150](#), to the magistrate judge's findings and recommendation are overruled;
2. The motion to remand for lack of jurisdiction, Filing No. [81](#), is granted;
3. The request for attorney fees, costs and expenses is denied;
4. Defendant Cesna's motion to file supplemental authority, Filing No. [159](#), is denied;
5. Plaintiffs' motion to respond, Filing No. [162](#), is denied as moot;
6. The findings and recommendation of the magistrate judge, Filing No. [148](#), is adopted in its entirety; and
7. The Clerk of Court is instructed to remand this case to the District Court of Douglas County, Nebraska.

DATED this 12th day of November, 2010.

BY THE COURT:

s/ Joseph F. Bataillon
Chief United States District Judge

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